

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOKO ONO LENNON, SEAN ONO LENNON,
JULIAN LENNON, and EMI BLACKWOOD
MUSIC, INC.,

08 CV 3813 (SHS)(FM)

Plaintiffs,

-against-

PREMISE MEDIA CORPORATION, L.P., C&S
PRODUCTION L.P. *d/b/a* RAMPANT FILMS,
PREMISE MEDIA DISTRIBUTION L.P. AND
ROCKY MOUNTAIN PICTURES, INC.,

Defendants.

**Affidavit of Darnetha Lincoln
M'Baye In Support of
Plaintiffs' Motion For A
Preliminary Injunction**

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

DARNETHA LINCOLN M'BAYE, being duly sworn, deposes and says:

1. I am a Manager in the Synchronization Department at EMI Music Publishing ("EMI"). I submit this affidavit in support of Plaintiff's Motion for a Preliminary Injunction. The facts stated herein are based on my personal knowledge, from viewing Defendants' film titled "Expelled: No Intelligence Allowed", and review of company records.

Unauthorized Use of "Imagine" by Defendants.

2. On April 16, 2008, EMI learned for the first time from press reports that the Defendants' film titled "Expelled: No Intelligence Allowed" (or, the "Movie") contained an unauthorized excerpt of the musical composition "Imagine" (or, the "Song"), written by world-renowned British songwriter and performer John Lennon. I

subsequently viewed "Expelled: No Intelligence Allowed" on April 18, 2008 at its first showing at 11:40 a.m. at the E-Walk Stadium 13 Theaters, located at 247 West 42nd Street, in Manhattan, New York.

3. My viewing of the Movie confirmed that Defendants' use of "Imagine" was unauthorized. The Song is immediately recognizable (Ben Stein, the narrator of the movie, actually "introduces" Imagine.) Then, to make its use even more compelling, lyrics from "Imagine" are printed across the screen during the time when the Song is being featured against the particular scene in the Movie.

4. EMI Blackwood Music, Inc. -- one of the many music publishing companies operating collectively under the trade name EMI Music Publishing -- is the exclusive administrator of the musical composition "Imagine". As such, any use of "Imagine" in an audio-visual work would require a synchronization license from EMI.

Defendants Failure To Secure a License for "Imagine"

5. I have been employed at EMI for eight and one-half (8.5) years. During that time, I have been in EMI's Synchronization Department in various capacities. In my current position as a Manager, I am responsible for analyzing and processing synchronization requests that EMI receives from potential licensees interested in licensing songs from EMI's vast catalog of musical compositions. I was responsible for licensing certain songs to Defendants for use in the Movie.

6. To the best of my knowledge, neither I nor EMI was approached by Defendants for proper licensing of this song. Notably, Defendants did approach EMI to secure a synchronization license for another musical composition owned and controlled by EMI for use in the Movie. It is beyond comprehension, however, why Defendants

failed at that time, or at any time, to secure a license for “Imagine”, which is one of EMI’s most prized and protected musical compositions in its vast catalog of songs.

7. Whenever a potential licensee requests permission for the use of an EMI-controlled musical composition in a film, that request is handled by EMI’s Synchronization Department. As a Manager in EMI’s Synchronization Department, I am responsible for processing such requests for use in independent films.

8. A potential licensee is required to send EMI their request in writing, which request includes the title of the song being requested, the title and brief description of the film, the type and duration of the use of the song, and a requested fee quote for such use.

9. Once I receive the written request, I then confirm whether the songwriter’s consent is required for the use of their song(s) in the film. I thereafter contact the songwriter or the songwriter’s designated representative in writing and provide them with the detailed preliminary information regarding the requested use. If I receive confirmation from the songwriter or songwriter’s designated representative that the proposed use and fee are satisfactory, I then contact the potential licensee in writing and confirm that the use and terms are acceptable. If the songwriter or songwriter’s designated representative rejects the use, I then contact the potential licensee in writing and explain that the requested use has been denied.

10. In this case, had EMI received a synchronization request for the use of “Imagine” in the Movie, EMI would have been contractually obligated to contact Mrs. Lennon (Yoko Ono), as the successor in interest to the Estate of John Lennon, for consent for such use. However, I never received a request for the use of this song in this Movie from the Defendants.

11. Because the Movie touches upon sensitive topics, and because “Imagine” was being used in a disturbing part of the film, it is highly likely that even if I submitted a request to Mrs. Lennon for the use of “Imagine” in the Movie, that request would have been denied.

12. Based on the manner in which the credits are displayed in the film, it makes it appear to the average person that the Song was licensed, when in fact it was not.


Darnetha Lincoln M'Baye

Sworn to before me
this 29th day of April 2008


Notary Public
STEPHEN DALLAS
Notary Public, State of New York
No. 02DAS180193
Qualified in New York County
Commission Expires Jan. 29, 2011